R & R Plaster & Drywall Co., Inc. *and* Central Pennsylvania Regional Council of Carpenters, Local 287 a/w United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Cases 6–CA–30309 and 6–CA–30323

November 23, 1999

ORDER DENYING MOTION

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On May 13, 1999, the Regional Director for Region 6 issued an order consolidating cases, consolidated complaint, and notice of hearing in this proceeding (complaint) alleging that the Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act. The Respondent filed an answer, denying the allegations of the complaint.

Thereafter, the Respondent filed a motion to dismiss the consolidated complaint and a supporting brief. The General Counsel filed an opposition to the Respondent's motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the allegations of the complaint, the denials in the Respondent's answer, and the assertions made by the General Counsel and the Respondent in their submissions, we find that there exist genuine issues of material fact that would best be resolved after an evidentiary hearing before an administrative law judge. Accordingly, we deny the Respondent's motion to dismiss the complaint.[1]

Member Hurtgen agrees with our denial of the Respondent's motion to dismiss paragraphs 7 and 8 of the complaint.[2] Member Hurtgen, however, argues that part of paragraph 9 of the complaint should be dismissed. For the reasons set forth below, we disagree.

Paragraph 9 of the complaint alleges that "[a]bout January 27, 1999, the Respondent, by its agent, by letter, threatened the arrest of union organizers for entering onto property the Respondent does not control." The letter in question was written by the Respondent's counsel and addressed to the Union. The letter stated as follows:

> This office represents [the Respondent] which has construction sites in and around the Harrisburg area.
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> We are advised that your representative . . . has been going upon the job sites of [the Respondent]. This is to advise you that our client and the general contractor with whom it is working regard your operators on their job sites as trespassers. Accordingly, this is to refrain [sic] you from further trespassing upon the job sites of [the Respondent].
>
> Further trespassing will result in the arrest of your personnel.

The relevant legal principles are well established. In *Indio Grocery Outlet*, 323 NLRB 1138, 1141 (1997), the Board reaffirmed that:

> [I]n cases in which the exercise of Section 7 rights by nonemployee union representatives is assertedly in conflict with a respondent's private property rights, there is a threshold burden on the respondent to establish that it had, at the time it expelled the union representatives, an interest which *entitled* it to exclude individuals from the property. [Emphasis in original.]

To determine the property interest, the Board explained in *Indio Grocery* that "we look to the law that created and defined the Respondent's property interest, which is state, rather than Federal law." Id. Doing so, the Board found that under the law of the state where the respondent's store was located the respondent did not have a right to exclude union agents from the walkway in front of its store and from its parking lot. Accordingly, the Board found that the respondent violated Section 8(a)(1) by threatening to have the union agents arrested if they did not cease engaging in Section 7 activities on the walkway and parking lot.

The Board's *Indio Grocery* decision was recently enforced by the Ninth Circuit. *NLRB v. Indio Grocery Outlet*, 187 F.3d 1080 (1999). The court specifically upheld

> [T]he Board's rule, that in cases in which the exercise of Section 7 rights by nonemployee union representatives is assertedly in conflict with a respondent's private property rights, the respondent bears a threshold burden to establish that it had, at the time it expelled the union representatives, an interest which entitled it to exclude individuals from the property. [187 F.3d at 1095.][3]

[1] To the extent that the Respondent seeks dismissal of the complaint because of alleged bias by the Regional Director, the motion is denied as lacking in merit.

[2] These paragraphs contain the following allegations:

> 7. About August 31, 1998, Respondent, by [Foreman] Myers, at Respondent's Hanover [Pennsylvania] jobsite, instructed employees that they should return to work following their lunch break by a specific alternative route in order that said employees would avoid contact with representatives of the Union who were present in the area of the customary route by which employees returned to work.
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> 8. About September 1, 1998, Respondent, by Myers, in a parking lot of Hanover Hospital, in Hanover, Pennsylvania, told an employee that said employee would not be considered for future employment with Respondent because said employee had associated with representatives of the Union.

[3] Our dissenting colleague claims that "the General Counsel's complaint" determines the allocation of the burden of proof on the question of whether the Respondent possessed a sufficient property interest to exclude the union representatives. He cites no authority for this seemingly novel proposition, and we know of none. We adhere to the Board and court precedent cited above.

Citing *Indio Grocery*, the Respondent argues that it did not violate Section 8(a)(1) by threatening to have nonemployee union organizers arrested for trespassing because, under Pennsylvania law, it had a property interest in its jobsites which entitled it to exclude individuals from the property. Relying particularly on *Hader v. Coplay Cement Mfg. Co.,* 410 Pa. 139, 189 A.2d 271 (1963), the Respondent contends that Pennsylvania law vests control over the worksite with the subcontractor, not the owner of the property, and that "[t]his control must include the ability to exclude nonemployees from the subcontractor's work area." Contrary to our dissenting colleague, we find that *Hader* does not require dismissal of any part of paragraph 9 of the complaint.

Hader involved a negligence suit brought by an employee of a company that had contracted to perform certain services for the owner of the land (the defendant). The suit was for injuries sustained in the course of the employee's work. Examining the contract between the company and the landowner, the Supreme Court of Pennsylvania concluded that the company was an independent contractor because it was not subject to control by the landowner in the manner of performing the work. Because, pursuant to the contract, the independent contractor, not the landowner, had possession and control "of the necessary area occupied by the work contemplated under the contract," the court held that the land owner was not liable for the injuries sustained by the employee of the independent contractor. 410 Pa. at 151; 189 A.2d at 277.

Thus, *Hader* addresses the issue of the tort liability of a landowner to an employee of an independent contractor. The issue raised by paragraph 9 of the complaint, however, is one of state property law, not state tort law, specifically whether a contractor has a right to exclude individuals from the owner's property. *Hader* does not even mention that issue. *Hader*, therefore, does not mandate dismissal of paragraph 9 of the complaint.

Furthermore, even assuming arguendo that our dissenting colleague is correct that, as a matter of Pennsylvania law, if a subcontractor has "possession and control for tort purposes," it likewise has "possession and control for trespass purposes," the Respondent would still not be entitled to dismissal of paragraph 9 of the complaint. Contrary to our dissenting colleague's assumption, *Hader* did not establish a per se rule that a subcontractor is always in possession and control of the work area. Rather, *Hader* makes clear that such possession and control is a factual issue that must be determined in each case by examining the contractual relationship among the parties. See *Hader*, 410 Pa. at 146–152; 189 A.2d at 275–277. If the landowner retained control, then the general rule of *Hader* would not apply, and the landowner would remain liable for tort purposes. See *Hader*, 410 Pa. at 151–152; 189 A.2d at 277 (distinguishing *Cooper v. Heintz Mfg. Co*., 385 Pa. 296, 122 A.2d 699 (1956)).[4]

In this case, unlike *Hader*, there is no evidence in this record of the nature of the relationship among the property owner, the general contractor, and the Respondent. Although it is the Respondent's burden to establish that it had an interest which entitled it to exclude individuals from the property, the Respondent has failed to supply us with copies of any of the relevant contracts. Without this evidence, there is no basis on which to conclude that the Respondent was "in possession of the necessary area occupied by the work contemplated under the contract" within the meaning of *Hader*. Therefore, in the words of our dissenting colleague, the Respondent has not even shown that it has "possession and control for tort purposes," a fortiori, it has not shown that it has "possession and control for trespass purposes."

Finally, even if we were to assume (1) that the Respondent has shown "possession and control for tort purposes" of its portion of the jobsite, and (2) that such a showing is sufficient under Pennsylvania law to establish "possession and control for trespass purposes," there is still a factual disagreement between the parties concerning whether the Respondent sought to exclude the union representatives from jobsite areas over which the Respondent lacked possession and control. Indeed, even our dissenting colleague concedes that the General Counsel has raised an issue for hearing in this respect.

Accordingly, for all these reasons, we find that the Respondent's denials of complaint paragraphs 7, 8, and 9 raise genuine issues of material fact, and that the Respondent has not shown that it is entitled to dismissal of any of the complaint allegations as a matter of law.

ORDER

IT IS ORDERED that the Respondent's motion to dismiss the consolidated complaint is denied, and the proceeding is remanded to the Regional Director for further appropriate action.

MEMBER HURTGEN, dissenting in part.

I would grant the Respondent's motion to dismiss with respect to paragraphs 9 and 10 of the complaint.

Those paragraphs allege that the Respondent violated Section 8(a)(1) of the Act by threatening the arrest of union organizers "for entering property the Respondent does not control."

The Respondent denies, and claims that it *does* control the property. With such control, it clearly has the power to oust the union organizers. [1]

[4] Similarly, in two subsequent cases, Pennsylvania courts did not apply *Hader* in a per se manner, but, rather, addressed the question of whether, under the relevant contracts, the landowner retained control of the work and premises. *Emery v. McCollum*, 725 A.2d 807 (1999); *Brletich v. U.S. Steel Corp*., 445 Pa. 525, 285 A.2d 133 (1971).

[1] *Lechmere v. NLRB,* 502 U.S. 527 (1992).

The General Counsel, of course, does not quarrel with *Lechmere*. Instead, he says, as alleged in his complaint, that the Respondent "does not control" the property from which it ousted the union organizers. Significantly, however, the General Counsel does not assert facts contrary to those relied on by the Respondent. Instead, the General Counsel quarrels with *the case law* relied on by the Respondent. In essence, the General Counsel argues that the case law is distinguishable.

In these circumstances, I think that we are presented with an issue of law. That is, we must take the facts asserted by the Respondent (and not controverted by the General Counsel), and determine whether they fit within the case law cited by the Respondent. If they do, i.e., if the General Counsel cannot distinguish the case law, then the Respondent is entitled to dismissal.

I now turn to the case law. It teaches that, under Pennsylvania law, the subcontractor (rather than the owner of the property) is in possession and control of the area in which it performs work.[2] The Respondent is such a subcontractor.

The General Counsel, in seeking to distinguish that case law, notes that it involves a suit by an injured employee of the subcontractor against the owner of the property. The case holds that the subcontractor, not the owner, is responsible. The subcontractor's "responsibility replaces that of the owner." Concededly, that case involves tort liability. However, the General Counsel does not demonstrate why the elements of possession and control for tort purposes would be different from possession and control for trespass purposes. In the absence of Pennsylvania law suggesting a difference, I would conclude that the subcontractor has possession and control for trespass purposes.

My colleagues argue that the Respondent has the burden of proof on the issue of control. They rely on *Indio Grocery* for the proposition that the Respondent has the burden of showing that it was entitled to exclude the union representatives from the property. That is, they say that the Respondent must show that it had control of the property, rather than having the General Counsel show that the Respondent had no such control. That proposition may be true as a general matter, but it has no application to this case. In this case, as noted above, the General Counsel undertook that burden. Whether he had to do so is beside the point. The fact is that he undertook that burden. His complaint alleged that the Respondent "does not control" the property. I think it elementary, certainly not "novel," that the prosecutor must prove the allegations of his complaint. The issue is whether he has met that burden. On the face of the pleadings, he has not done so. He has made a bare allegation of absence of control; the Respondent has replied that, under state case law, there is a presence of control; and the General Counsel has not averred facts to distinguish that case law.

My colleagues also assert that "the general rule of *Hader*" does not apply because the contractual instruments in the instant case *may* vest control in the Respondent. However, the General Counsel, who bears the burden of proof, does not even make this claim, and consequently he does not set forth these instruments in his brief. Accordingly, we are left with state law, which teaches that the subcontractor has control of the property. And, as my colleagues concede, it is state law to which the Board looks in deciding these issues.

Finally, the General Counsel suggests that the Respondent sought to oust the union organizer from jobsite areas where the Respondent was not in possession and control. I do not read the Respondent's letter to the Union as saying this. However, to eliminate any ambiguity, I would dismiss the complaint only insofar as it involves the Respondent's ouster of union agents from its portion of the jobsite, i.e., "the necessary area occupied by the work." If the General Counsel can show that the Respondent sought to oust union agents from other portions, he may do so at trial.

[2] *Hader v. Coplay Cement Mfg. Co.,* 410 Pa. 139, 151; 189 A.2d 271 (Sup. Ct. of Pa.).